

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

FIBER BUSINESS SOLUTIONS GROUP, INC.¹

Employer

and

Case 4–RC–21020

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 98,
AFL-CIO

Petitioner

**REGIONAL DIRECTOR’S DECISION AND
DIRECTION OF ELECTION**

The Employer, Fiber Business Solutions Group, Inc., installs telecommunications cable and equipment. The Petitioner, International Brotherhood of Electrical Workers, Local 98, AFL-CIO, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of the Employer’s inside and outside plant technicians, splicers and helpers. The Petitioner amended its petition at the hearing to exclude office personnel. The parties disagree as to the unit placement of John Bintner, Stephen Bobb, Brian Kasnowski and Danny Lorah². The Petitioner, contrary to the Employer, contends that Bintner, Bobb and Kasnowski are office personnel and do not share a community of interest with the unit employees and should be excluded from the unit. The Employer, contrary to the Petitioner, contends that Danny Lorah³ is a supervisor and would exclude him from the unit. The Petitioner’s proposed unit would consist of seven employees, while the Employer’s proposed unit would consist of nine employees.

¹ The Employer’s name appears as amended at the hearing.

² The parties agree that Larry Gennaro, Mark Hoskinson, Ron Lorah, Dave Matthews, Sr., Dave Matthews, Jr, and Thomas Nolen should be included in the unit. The parties stipulated that Ben Gallo, one of the Employer’s owners, should be excluded from the unit.

³ Danny Lorah is also referred to in the record as Dan Lorah.

A Hearing Officer of the Board held a hearing on the issues in this case. Neither party filed a brief. I have considered the evidence and arguments presented by the parties concerning the composition of the unit, and I have concluded that John Bintner, Stephen Bobb and Brian Kasnowski should be included in the unit sought by the Petitioner. I further find that Danny Lorah is not a supervisor and should also be included in the bargaining unit.

In this Decision, I will first present an overview of the Employer's operations, then will review the factors that must be evaluated in determining whether Vintner, Bobb and Kasnowski should be included in the unit, and then will present in detail the facts and reasoning that support their inclusion in the unit. Thereafter, I will review the factors that must be evaluated in determining whether Danny Lorah is a supervisor within the meaning of Section 2(11) of the Act, and will present the relevant facts and analysis as to his supervisory status.

I. OVERVIEW OF OPERATIONS

The Employer is a telecommunications construction company with an office located in Norristown, Pennsylvania. The Employer has been in business only nine months and its main customer is AT&T. The Employer does a limited amount of work for other telecommunication customers. Ben Gallo and his wife are the owners of the company. Gallo, Lorah and several other unit employees previously worked for Hugh O'Cane Company performing the same telecommunications construction work for AT&T which it now performs. When O'Cane moved its operations, Gallo decided to perform this work with his own company, and hired Lorah to be the company's Project Manager. Since September 2004, the Employer has expanded the volume of AT&T work. Most of the work performed by the Employer is "OSB" construction, meaning work performed outside of customers' buildings. OSB work typically consists of field communications installation work including aerial and underground work, installing fiber optic cable, splicing and rerouting cable, flagging⁴ and installing conduit that would carry or hold the cable. OSB employees report to the yard outside the Employer's Norristown office where they receive their daily project assignments and they return to the yard at the end of the work day.

II. FACTORS RELEVANT TO EVALUATING THE INCLUSION OF BINTNER, BOBB AND KASNOWSKI IN THE APPROPRIATE UNIT

The Board's procedure for determining an appropriate unit under Section 9(b) is first to examine the petitioned-for unit. If that unit is appropriate, the inquiry ends. *American Hospital Association v. NLRB*, 499 U.S. 606, 610 (1991); *Dezcon, Inc.*, 295 NLRB 109, 111 (1989). If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, but it also has the discretion to select an appropriate unit that is different from the alternative unit proposals of the parties. See *The Boeing Co.*, 337 NLRB 152, 153 (2001); *Bartlett Collins Co.*, 334 NLRB 484 (2001). The Board generally attempts to select a unit that is

⁴ Flagging is when two employees stand on the roadside and flag cars because a traffic lane is either closed or partially closed while the OSB crew is working in the traffic lane. Gallo testified that OSB employees rotate the flagging among themselves."

the smallest appropriate unit encompassing the petitioned-for employee classifications. See *Overnite Transportation Co.*, 331 NLRB 662, 663 (2000). It is well settled that the unit need only be *an* appropriate unit, not the most appropriate unit. *Morand Brothers Beverage Co.*, 91 NLRB 409, 418 (1950), *enfd.* on other grounds 190 F.2d 576 (2d Cir. 1951).

The touchstone for determining whether a bargaining unit is appropriate is a community-of-interest analysis. In determining whether a group of employees possesses a community of interest, the Board examines such factors as the degree of functional integration between employees, common supervision, skills, and job functions, employee contact and interchange, and similarities in wages, hours, benefits, and other terms and conditions of employment. See *Home Depot USA*, 331 NLRB 1289 (2000); *Esco Corp.*, 298 NLRB 837 (1990).

III. FACTS REGARDING UNIT INCLUSION OF DISPUTED EMPLOYEES

The Work Performed by John Bintner, Stephen Bobb and Brian Kasnowski

John Bintner was initially hired as a splicing assistant to help Danny Lorah. He spent the first several months of his employment in the field with Lorah performing OSB construction work such as splicing, cleaning, setting fiber cable in place, and flagging. About one month prior to the hearing, Bintner was assigned to work on a project at the AT&T office located in King of Prussia, Pennsylvania doing the groundwork and planning for another project the Employer hopes to obtain and construct. This project was expected to end during the week of May 9, 2005, and Bintner was expected to go back to performing OSB work. While working on these projects, Bintner occasionally substituted for an absent OSB employee.

Stephen Bobb's work consists of sticking poles,⁵ measuring jobs prior to actual installation, (reeling footage) and identifying areas that might need work. The areas which need work are presented to AT&T The Employer hopes AT&T will authorize the additional work. Bobb sporadically acts as an OSB foreman. Gallo testified that he hired Bobb because he is a retired Verizon lineman, and can perform, and has performed, OSB construction work. Bobb occasionally reports to the Norristown yard and he transports OSB employees to job sites and delivers paperwork to these sites.

Brian Kasnowski, like Bobb, works in the field sticking poles and reeling footage. Kasnowski, who was hired two or three months ago, has been working on a project with Bintner and Bobb at the AT&T King of Prussia office obtaining permits for future potential OSB jobs. Kasnowski was hired primarily to do permitting work but he was also to perform OSB work if required, and he has done so in emergency situations.

Bintner, Bobb and Kasnowski have performed some path verification work verifying the proposed fiber optic path, verifying that there is a pole line, and contacting owners of the poles to

⁵ The record is unclear as to what this function entails.

obtain a permit to do an attachment to the pole. They also measure heights, go inside manholes and complete the paperwork and file it to obtain the permits.

Supervision

Although the record establishes that the Employer's work force is a highly independent force that requires little supervision, Ben Gallo supervises the OSB work and the work performed by Bintner, Bobb and Kasnowski.

Skills

In general, OSB employees and Bintner, Bobb and Kasnowski possess similar skills and perform similar types of work. The disputed employees do the preliminary work like measuring and verifying pole lines so that the OSB employees can install, splice, and reroute the cable. While Bintner and Bobb perform some of their work at the AT&T office, Kasnowski performs most of his work at the AT&T office. OSB employees perform their work exclusively in the field. According to Gallo, the skills of OSB construction employees are interchangeable, and most of these employees can do the same tasks and jobs. Gallo testified that Bintner, Bobb and Kasnowski were hired with the understanding that they would perform OSB field work.

Wages

The OSB employees and the three disputed employees are paid on an hourly basis, and receive time and one half for overtime work. All employees, except Danny Lorah, make approximately \$50,000 per year.

Interchange

The record contains numerous examples of interchange between OSB employees and the three disputed individuals. Thus, Bintner spent the first several months of his employment performing OSB work, and more recently substituted for an OSB employee who did not show up for work. Bobb has performed OSB construction work and occasionally goes to the yard to deliver paperwork to the OSB employees or to take OSB employees to their job sites. Additionally, Ron Lorah, whose inclusion is not at issue, has performed flagging work.⁶

IV. ANALYSIS

I find that Bintner, Bobb and Kasnowski are properly included in the unit sought by Petitioner. Bintner, Bobb and Kasnowski possess similar skills, work the same hours, perform similar types of field work as the OSB employees and are covered by the same terms and conditions of employment. While some of the work performed by these three individuals occurs at the AT&T office, this work is functionally integrated with outside construction work. All of

⁶ Ron Lorah, the brother of Danny Lorah, is a computer aided design (CAD) operator who works almost exclusively at the AT&T office preparing blueprints.

the employees' assignments originate with Gallo, and Gallo supervises all of the disputed employees as well as the OSB employees. Like other OSB employees, Bintner, Bobb and Kasnowski are paid on an hourly basis, receive time and one half for overtime work, and with the exception of Danny Lorah, earn the same amount as other OSB employees. Bintner spent his first several months performing OSB work and has substituted for an OSB employee who did not report for work. Bobb has performed OSB construction work and occasionally goes to the yard to take paperwork or to take OSB employees to the job sites. Although Kasnowski has performed emergency OSB work, he has performed some of the preliminary work, like sticking poles and reeling footage, before OSB employees begin installations. In addition, while Kasnowski was hired, in large part, to assist in the permitting work, if needed, he will be assigned to perform OSB work. Based on common supervision, wages, hours, similar skills and employment conditions, regular contact and functional integration, I find that there is a sufficient community of interest between John Bintner, Stephen Bobb and Brian Kasnowski to warrant their inclusion in the petitioned-for unit. *Micronesian Telecommunications Corporation*, 273 NLRB 354, 357-358 (1984); *National Telephone Company*, 219 NLRB 634, 637 (1975).

V. THE SUPERVISORY STATUS OF DANNY T. LORAH

A. Applicable Precedent

The burden of establishing supervisory status is on the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001); *Fleming Companies, Inc.*, 330 NLRB 237 fn. 1 (1999); *Bennett Industries*, 313 NLRB 1363 (1994). Supervisors are specifically excluded from coverage under the National Labor Relations Act. Section 2(11) of the Act sets forth a three-part test for determining whether an individual is a supervisor. Pursuant to this test, employees are statutory supervisors if: (1) they have the authority to engage in any one of the 12 supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. See *NLRB v. Kentucky River Community Care, Inc.*, supra, 532 U.S. at 712-713; *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994).

The statutory criteria for supervisory status set forth in Section 2(11) are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. See *Juniper Industries, Inc.* 311 NLRB 109, 110 (1993). The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status on an employee. See *Juniper Industries, Inc.*, supra at 110. The authority to effectively recommend an action means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. See *Children's Farm Home*, 324 NLRB 61 (1997); *Hawaiian Telephone Co.*, 186 NLRB 1 (1970). The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the protection of the Act. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996). Where the evidence is in conflict or otherwise inconclusive on

particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. See *Gaines Electric*, 309 NLRB 1077, 1078 (1992); *Ohio Rivera Co.*, 303 NLRB 696, 714, (1991), *enfd.* 961 F.2d 1578 (6th Cir. 1992).

In *Kentucky River*, the Court decided, contrary to the Board, that RNs at a residential nursing care facility were supervisors within the meaning of the Act. In determining that the nurses were not supervisors, the Board had emphasized, *inter alia*, that while they directed the work of the nurses' aides, this direction did not involve independent judgment because it was by virtue of the nurses' training and experience, not because of their connection to management. The Court acknowledged that the term "independent judgment" is ambiguous with respect to the *degree* of discretion required for supervisory status and recognized that it was "within the Board's discretion to determine, within reason, what scope of discretion qualifies." 532 U.S. at 713. The Court rejected the Board's analysis, however, because the Board erroneously excluded from the statutory definition of independent judgment, "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards," even where the employees exercised sufficient degree of discretion to otherwise warrant a supervisory finding. *Id.* In all other respects, the Court left intact the Board's traditional role in drawing the line between the performance of functions which are clerical and routine and assignment and direction that involve a sufficient element of discretion to confer supervisory status.⁷ The Court did not hold that every exercise of professional or technical judgment in directing other employees is necessarily an exercise of independent judgment, but recognized that the Board could determine the degree of independent judgment necessary to meet the statutory threshold for supervisory status. *Id.* at 714. The Court also indicated that "the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer." *Id.* at 713-714.

B. Facts

The Employer contends that Danny Lorah is a supervisor based upon his authority to hire, to set rates of pay for new hires, to monitor the performance of employees, to discipline employees, to assign work to employees, and to submit weekly updates on the status of projects. Additionally, the Employer asserts that Danny Lorah has the authority to fire and suspend, but conceded that Lorah has not exercised that authority.

Danny Lorah's Duties

According to Employer owner Ben Gallo, Lorah is an OSB project manager who oversees the OSB construction work. He reports to the yard every day and picks up the blueprints of the relevant location of the job. The blueprints are made by the CAD operator and

⁷ The Court further suggested that the Board might, "offer a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others' performance of discrete tasks from employees who direct other employees." *Id.* at 720.

describe the size of cable they will be placing, the approximate footage, and places where splices actually occur. After obtaining the blueprints, Lorah drives to the field, generally with six other employees, to perform the work. Lorah conceded that employees on the field jobs report to him, although he denied that he was project manager.⁸ According to Lorah, once on the job site, the employees, for the most part, decide among themselves who is needed where based upon what needs to be done at a specific location. When he needs additional employees, Lorah calls Gallo who usually honors his request. Lorah is an experienced splicer and performs the splicing work at the job sites. At the end of the day Lorah, as well as all the other OSB employees, return to the yard. Gallo testified that each individual employee is responsible for getting their weekly time sheets in to Gallo, but that Lorah may collect the time sheets of the employees who worked with him and he will e-mail that information to Gallo. Gallo and Lorah both testified that Lorah provides weekly status reports to Gallo at the end of each week, showing the work performed, the materials used, and the actual hours worked. According to Gallo, the Employer's jobs for AT&T sometimes cover a geographical area wide enough to require employees to work in separate areas. On such occasions, one of the employees will oversee other crew members. However, this employee still reports to Lorah. When the Employer has two or more ongoing jobs, Gallo acts as project manager for those jobs.

Lorah denied that he is a supervisor and that he is the OSB supervisor. Lorah testified that he is only a technician and does not have a job title. He has worked in the field for 14 years and he is the Employer's only fiber splicer. According to Lorah, he takes care of the day-to day business in the field, and every morning he reports to the yard to pick up a truck, drives to the field, drops aerial splice pieces, places cable on poles, splices fiber optic cable and splices pieces.

Authority to Hire

There is a wide divergence in the testimony of Gallo and Lorah concerning Lorah's authority to hire and recommend hire of employees. Gallo and Lorah worked together at an area identified as O'Cane. Gallo decided to open this business when O'Cane closed. Gallo testified that some former O'Cane employees were hired by Lorah to work for the Employer without his input and that he did not see these employees until their first day of work. Although Gallo testified that Lorah has conducted the initial interviews and referred applicants to him for a final interview with recommendations to hire, he did not give any specific examples of these applicants.⁹

Lorah testified that he does not have the authority to hire and that he did not hire the former O'Cane employees. According to Lorah, Gallo offered employment to him and the former O'Cane employees at his new company. Lorah also testified that he had never

⁸ Lorah concedes that Gallo hired him to be project manager and that he agreed to run the Employer's field jobs. According to Lorah, shortly after being hired, he had a salary dispute with Gallo and his supervisory authority was stripped. At another point in the transcript, Lorah testified that he was never told he was a supervisor or manager. Lorah testified that he is a general foreman. Gallo testifies that Lorah is, and was, a project manager who runs the Employer's jobs and supervises field employees.

⁹ Gallo testified that current employees have recommended others for employment with the Employer.

interviewed, talked to, or contacted any prospective employee, and that he has never recommended an employee for hire or recommended the rate of pay for any prospective employee. Lorah did testify that on one occasion Gallo asked him what he thought of an employee before he was hired and that he told Gallo that he did not really know the prospective employee.

Authority to Set Rates of Pay for New Hires

Gallo testified that he discussed pay rates for new hires with Lorah before the employee was hired, and that Lorah recommended the rate a new hire should be paid. Gallo did not offer any specific examples of employees whose rate of pay he discussed with Lorah prior to their hiring, or any examples in which Lorah had recommended or set a rate of pay for a new hire. Lorah, on the other hand, testified that although he has a rough idea of the rates of pay of other employees, he has never discussed the salary of any employee who has been hired before the employee was hired, and that he never discussed with Gallo the rate of pay of new hires.

Authority to Monitor the performance of Employees

Gallo testified in general terms that Lorah monitors the performance of other employees and that he will tell Gallo when somebody “is not making the grade.” Gallo did not cite any specific examples of Lorah having exercised this authority.

Authority to Discipline

Gallo testified that Lorah has the authority to discipline employees and that he has disciplined employees for not showing up to work on time by reporting them to Gallo, and for not performing a job properly. With respect to the disciplining of employees for not showing up for work on time, Gallo did not cite specific examples. Gallo and Lorah testified that Lorah had corrected two employees who had not performed their work in accordance with the blueprints. Lorah testified that he did not issue verbal warnings or discipline the two employees. While Gallo testified that Lorah has issued verbal warnings to employees, he did not give examples of the employees who Lorah warned. Gallo testified that if an employee reported to work intoxicated or was insubordinate, that Lorah could fire the employee on the spot, but stated that this has never happened. Lorah testified that if he had an employee who reported back from lunch intoxicated he would call Gallo and report the incident. He stated that this has never happened.

Assignment of Work, Call Outs and Other Responsibilities

The record disclosed that the Employer’s OSB employees, for the most part, are skilled and that they decide among themselves who is going to perform respective tasks at the job site. Lorah testified that on occasion an employee will ask him where to work and he will tell employees to work at a specific location on the job site.¹⁰ Lorah and Gallo agree that Lorah

¹⁰ Gallo testified that Lorah determines what specific job an employee is going to perform.

requests additional employees, usually flaggers, and that Lorah assigns them to their road locations. Flagging work is unskilled.

Gallo testified that if an employee who works with Lorah is going to be absent they will call Lorah. Lorah testified that when the Employer began operation, employees called him when they were going to be absent but that Gallo insisted that employees call him directly. According to Lorah, employees now call Gallo directly if they are not going to report to work.

Gallo testified that Lorah helps to prepare numerical analyses to bid on jobs. This entails estimating the time that a job is estimated to take, and the applicable wage rates of employees. Lorah denied that he has any involvement in the costing of jobs.

C. Analysis

I find that the Employer has not carried its burden of establishing that Danny Lorah is a supervisor within the meaning of Section 2(11) of the Act. There is a wide divergence in testimony regarding Lorah's authority to hire, or effectively recommend the hire of, employees, to discharge, suspend, or otherwise discipline them, and to establish their pay rates. As the evidence is in conflict, I cannot rely on it in establishing supervisory authority with respect to these indicia. *Phelps Community Medical Center*, supra at 490.

I also conclude that the Employer has failed to establish that Lorah assigns employees, responsibly directs them, or exercises independent judgment as those terms are defined in Section 2(11) of the Act. The record demonstrates that, for the most part, unit employees decide among themselves the tasks to be performed when in the field. There are occasions, when Lorah will assign installers to a specific utility pole on a job site, and flaggers to a specific road location on the sites. However, because the skills of employees assigned to these locations do not vary significantly, and the assignments are largely predetermined by the blueprints, distribution of these assignments is generally routine and not supervisory. *Volair Contractors, Inc.*, 341 NLRB No. 98, slip. op. at 3 (2004); *Ferguson Electric*, 335 NLRB 142, 147 (2001); *Bozeman Deaconess Hospital*, 322 NLRB 1107 (1997). While on one occasion Lorah reported an incident of unacceptable work performance to Gallo, and chastised the employees involved, this is not enough to make Lorah a supervisor. *Ten Broeck Commons*, 320 NLRB 806, 812 (1996). In general, I find that Lorah's responsibilities with respect to assignment and direction of employees do not demonstrate the exercise of independent judgment, but rather involve routine decisions typical of lead persons found by the Board not to be statutory supervisors. See, e.g. *Jordan Marsh Stores Corp.*, 317 NLRB 460, 467 (1995); *Brown & Root, Inc.*, 314 NLRB 19, 21-22 (1994).

The record established that Lorah is paid \$30,000 more than the other hourly employees. Also, a finding of employee status for Lorah would mean that the supervisory ratio to employees would be 10 to 1. These are both secondary indicia of supervisory status. Because the Employer has failed to establish the existence of any primary indicia of supervisory status, those factors do not result in a finding of supervisory status. *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

Conclusion

Based on the foregoing, I find that the Employer has not satisfied its burden of proving that Danny Lorah possesses the indicia of supervisory authority set forth in Section 2(11) of the Act. Accordingly, I find that Lorah is not a supervisor under Section 2(11) of the Act and is eligible to vote in the election.

VI. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time inside and outside plant technicians, splicers and helpers excluding all other employees, guards, and supervisors as defined in the Act.

VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by **International Brotherhood of Electrical Workers, Local 98, AFL-CIO**. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Eligible Voters

The eligible voters shall be unit employees employed during the designated payroll period for eligibility, including employees who did not work during that period because they

were ill, on vacation, or were temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Additionally, eligible are those employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months, or who have had some employment in that period and have been employed for a total of 45 working days within the 24 months immediately preceding the payroll period ending immediately preceding the date of this Decision, and also have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.¹¹ Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are 1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, 2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and 3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within (seven) **7** days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election, only after I shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106 on or before, **June 21, 2005**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (215) 597–

¹¹ *Steiny & Co.*, 308 NLRB 1323 (1992); *Daniel Construction*, 133 NLRB 264 (1961), modified in 167 NLRB 1078 (1967).

7658, or by e-mail to Region4@NLRB.gov.¹² Since the list will be made available to all parties to the election, please furnish a total of two (2) copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. A request for review may also be submitted by e-mail. For details on how to file a request for review by e-mail, see <http://gpea.NLRB.gov/>. This request must be received by the Board in Washington by 5:00 p.m., EDT on **June 28, 2005**.

Signed: June 14, 2005

at Philadelphia, PA

/s/ [Dorothy L. Moore-Duncan]

DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

¹² See OM 05-30, dated January 12, 2005, for a detailed explanation of requirements which must be met when electronically submitting representation case documents to the Board, or to a Region's electronic mailbox. OM 05-30 is available on the Agency's website at www.nlr.gov.